Supreme Court, U.S.
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No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY THE STATE OF IOWA AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory states submit this Brief as Amici Curiae in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 37.5.

II. INTEREST OF AMICI CURIAE

At issue in this case is the proper interpretation of a federal statute commonly referred to as Public Law 86-272 (codified at 15 U.S.C. § 381). This federal statute restricts a state's right to impose a net income tax, as defined in 15 U.S.C. § 383, on income derived within such state and, therefore, is applicable to the Amici because they impose such taxes.

The signatory Amici States impose either net income taxes or franchise taxes measured by net income which are implicated by P.L. 86-272. Michigan also uses P.L. 86-272 as a guide to determine nexus for imposition of other taxes. The Amici believe that the Wisconsin Supreme Court's decision in this case incorrectly interprets P.L. 86-272. They desire a decision from this Court as to the proper legal standards to be employed in application of the statute. The many hopelessly conflicting state court decisions regarding the legal standard to apply in determining whether a taxpayer is immunized from a state's net income tax by P.L. 86-272 have created uncertainty for tax administrators and taxpayers.

III. SUMMARY OF ARGUMENT

State courts of last resort have interpreted P.L. 86-272 in conflicting ways, applying drastically different legal standards in determining whether an out-of-state corporation is immune from a state's net income tax. The lack of a definitive uniform interpretation of the federal statute creates inequities and problems for states and taxpayers. Public Law 86-272, as a federal statute, should have a uniform interpretation which only this Court can provide. The Wisconsin Supreme Court and some other courts have interpreted P.L. 86-272 in a way which overly restricts the power of the states to impose a net income tax. Therefore, this case involves an important question of federal law which needs to be settled by the United States Supreme Court so as to give guidance to state courts with respect to the interpretation of the federal statute.

IV. ARGUMENT

Public Law 86-272 provides, in relevant part:

Minimum Standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(Emphasis added.)

Public Law 86-272 was discussed by this Court in *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), in which the Court stated:

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357, 67 A.L.R.2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U.S., at 452, 3 L.Ed.2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381] within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere*

> *solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal.*

409 U.S. at 279-80 (footnotes omitted; emphasis added).

"Clarity which would remove uncertainty" has not been achieved. In fact, "solicitation" has been "a definitional quagmire." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:11, at 390 (Supp. 1990). State courts of last resort disagree on the legal standards both as to the quality and quantity of acts which a company may do in a state and still be exempted from that state's net income tax by P.L. 86-272. The interpretations of the phrase "solicitation of orders" range from a narrow strict view to the extremely broad view of the Wisconsin Supreme Court in this case.

In *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557, 562 (1971), the Court concluded, "The legislative history of the act clearly indicates that a narrow construction of the term 'solicitation of orders' was intended by Congress." The Alaska Supreme Court narrowly construed P.L. 86-272 in *Sjong v. Alaska Dept. of Revenue*, 622 P.2d 967, 975 (Alaska 1981). A narrow interpretation was recently reaffirmed by the Supreme Court of Arkansas in *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 258 (Ark. 1990). In a case involving the same taxpayer,

U.S. Tobacco Co., the Supreme Court of Pennsylvania concluded that the legislative history of P.L. 86-272 supported its broad view that "solicitation" involved "sundry activities so long as those activities were closely related to the eventual sale of a product." *U.S. Tobacco Co. v. Pennsylvania*, 386 A.2d 471, 478 (Pa. 1978), *cert. denied*, 439 U.S. 880 (1978). "[A]cts of courtesy . . . in order to satisfy or accommodate customers" and any other acts "inextricably related to solicitation" may be performed by a company in Pennsylvania without the company losing its P.L. 86-272 immunity. The dissenting opinion in the Pennsylvania case makes it clear that U.S. Tobacco did substantially the same activities in Pennsylvania as it did in Arkansas. Yet, in Pennsylvania it is immune from income tax and in Arkansas it is not.

Other cases adopting a broad interpretation of "solicitation" include *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981), and *Gillette Co. v. State Tax Comm.*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 45 N.Y.2d 846, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978). These cases adopt the same legal standard for "solicitation of orders" as the Pennsylvania Supreme Court applied in *U.S. Tobacco* and as the Wisconsin Supreme Court employed in the instant case.

A middle view extends P.L. 86-272 immunity to the "generally accepted or customary acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training." *Olympia Brewing Co. v. Department of Revenue*, 5 Or. Tax 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974). "Presale activities

are distinguishable from similar activities that constitute services after the sale." *Id.* The Oregon Supreme Court gave the term "solicitation" "its generally accepted meaning in the light of its legislative history." *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081, 1083 (1976). In *Drackett Products Co. v. Conrad*, 370 N.W.2d 723, 726 (N.D. 1985), the North Dakota Supreme Court stated that a business exceeds "solicitation of orders" for purposes of P.L. 86-272 "if its activities go beyond acts necessary for and leading to the placing of orders." "[I]f an out-of-state business engages, within [North Dakota], in other ongoing activities which are commonly associated with maintaining a business operation, it is not exempt from North Dakota taxation under 15 U.S.C. § 381." 370 N.W.2d at 726.

Contrary to the standard applied by the Wisconsin Supreme Court, some courts believe that the fact that a company's activities in a state "will eventually result in increased orders" does not blanket all of those activities with the protection afforded by P.L. 86-272. *See, e.g., Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, 218 (1970), *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971). "[F]unctions more commonly related to maintaining an on-going business operation," "generating greater income than could be achieved simply through the solicitation of orders," have been held not immunized by P.L. 86-272. *See National Tires, Inc. v. Lindley*, 68 Ohio App. 2d 71, 426 N.E.2d 793, 798 (1980). Also, whereas the Wisconsin Supreme Court said that "the court must consider the type of business involved" (465 N.W.2d at 811-12), Oregon has recognized that "[m]any businesses, by their very

nature, cannot claim the benefits of the federal statute. . . . " *Olympia Brewing Co. v. Dept. of Rev.*, 5 Or. Tax 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (Ore. 1973), *cert. denied*, 415 U.S. 976 (1974).

In addition to conflicting interpretations regarding the *nature* of the acts immunized by P.L. 86-272, there is a conflict in the state courts' decisions concerning the *quantity* of nonsolicitation activities that may be performed. The Wisconsin Supreme Court stated (465 N.W.2d at 811) that any activities by Wrigley within the state "that could be considered as somehow not being inextricably bound up in solicitation . . . are so minor as to be *de minimis*" and not of "sufficient weight" as to remove Wrigley from the protection of P.L. 86-272. Some other courts have also adopted a *de minimis* standard. *See, e.g., Coors Porcelain Company v. Colorado*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *John Ownbey Co. v. Butler*, 211 Tenn. 336, 365 S.W.2d 33 (1963); *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981). Commentators have criticized courts which adopt a *de minimis* exception for unprotected activities. *See* Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 305, 311 (Winter 1985); Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 381, 384-85 (1976); P. Hartman, *Federal Limitations on State and Local Taxation* § 9:12, at 504, 507 (1981). Other courts have made it clear that a *de minimis* standard does not apply. For example, in *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 260 (Ark. 1990), it was "not the frequency of the visits or volume of sales" upon which the decision turned. The Court was "concerned with the *nature* of the

Company's activities" *Id.* In *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. banc 1990), the Court stated that "it is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability." *See also Chattanooga Glass Company v. Strickland*, 244 Ga. 603, 261 S.E.2d 599, 601 (1979) (taxpayer exceeded "solicitation" when it remedied complaints a few times per year within the taxing state). There is no textual support in P.L. 86-272 for a *de minimis* exception for nonsolicitation activities. The statute clearly states that "the only business activities" in the taxing state must be limited to "the solicitation of orders." This conflict among state courts of last resort regarding the use of a *de minimis* standard needs to be resolved.

Public Law 86-272 was enacted largely because "[p]ersons engaged in interstate commerce [were] in doubt as to the amount of local activities within a State that [would] be regarded as forming a sufficient 'nexus.' " S. Rep. No. 658, 86th Cong., 1st Sess., at 2; U.S. Code Cong. & Admin. News 1959, p. 2549. The Senate Committee on Finance, which reported the original bill, "believe[d] that, unless some certainty is restored to this area, the economic implications for the economy of the entire Nation may be unfortunate." S. Rep. No. 658, 86th Cong., 1st Sess., at 2; U.S. Code Cong. & Admin. News 1959, p. 2550. The Committee discussed several of those implications.

Because of the variety of interpretations given to P.L. 86-272 by state courts and tax administrators, the uncertainty which led to P.L. 86-272 has increased. Tax administrators are uncertain which legal standard to apply, and taxpayers are uncertain whether they should file returns in states where they are not domiciled or incorporated.

States invest time and expense in investigating, auditing, and litigating to defend their interpretation of P.L. 86-272. Taxpayers immunized by P.L. 86-272 under some states' interpretations of the federal statute must pay a net income tax to other states as a result of different interpretations even though their activities are the same in those states. Clearly, there needs to be a uniform interpretation in all states of P.L. 86-272. "[T]he failure to have trustworthy guidelines on the meaning of 'solicitation of orders' and 'delivery' is most unfortunate for *both* the taxpayer and the taxing authority." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 518 (1981). Only this Court can provide these vital "trustworthy guidelines."

The Wisconsin Supreme Court decision, interpreting P.L. 86-272 broadly to immunize from state net income tax a corporation with a multitude of activities within the state, conflicts with the plain language of the statute, the legislative history, and this Court's language in *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). As this Court pointed out in *Heublein*, the "legislative history of § 381 shows that Congress had rather limited purposes." 409 U.S. at 279. Also, " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. [Citation omitted.]' " 409 U.S. at 281-82. The Wisconsin Supreme Court's decision drastically alters the federal-state balance, interpreting P.L. 86-272 in a manner which greatly restricts states' power to tax. "Congress is presumed to respect state sovereignty and traditional state powers unless, and only to the extent, that it explicitly limits those powers." *U.S. Tobacco Co. v. Pennsylvania*, 386 A.2d

471, 482 (Pa. 1978) (dissenting opinion), *cert. denied*, 439 U.S. 880 (1978). If Congress had intended to immunize from taxation all sales-related activities in the taxing state by out-of-state companies, it could easily have said so. Congress did not say that out-of-state merchants which did not own property in a state could not be required to pay state income tax, even though all activities of the merchants would presumably be directed toward increasing future orders. There was no intent to eliminate such a huge portion of states' tax bases upon which they rely. In fact, a proposed bill which would have prevented states from imposing a net income tax on a business unless it maintained an office, salable inventory, warehouse or other place of business, or had an agent who maintained an office or other place of business in the state was rejected. *See* H.R. 936, 86th Cong., 1st Session (1959) (reporting H. J. Res. 450); S. J. Res. 113, 86th Cong., 1st Sess. (1959).

The overly broad interpretation of "solicitation of orders" "not only results in unfair loss of revenue to the taxing States, but local business suffers a competitive handicap since it must shoulder the tax burdens which the out-of-state seller has unfairly escaped by reason of Public Law 86-272." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 517-18 (1981). The broad interpretation used by the Supreme Court of Wisconsin allows an out-of-state company to do practically anything in a state that a local company would do, and benefit from the same state services as the local company, but not pay any tax to the state to help pay for those services. The local company is not protected by P.L. 86-272, and if the state cannot tax out-of-state companies, local companies

have to carry a greater share of the tax burden. The typical small business, domiciled in and taxed upon its profits by a state, will not be able to compete with a large multistate operator who pays no state income taxes where he sells his products.

V. CONCLUSION

Wisconsin's Petition raises issues which have a significant impact in the field of state taxation of income and are of vital concern to the Amici. The Petition raises important questions of federal law which have not been, but should now be, settled by this Court. Those questions of federal law have been decided by the Wisconsin Supreme Court in a way that conflicts with decisions of other state courts of last resort. Therefore, we urge this Court to grant Wisconsin's Petition for a Writ of Certiorari and to give plenary consideration to the matter.

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